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THE REACTION OF THE INTERNATIONAL COMMUNITY TO ATROCITIES

This book examines the *judicial response* of both national and international courts to the commission of those serious violations of international standards on human rights or humanitarian law that reach the legal threshold of international crimes. It is nonetheless appropriate briefly to consider the more general question of how the international community at present reacts to atrocities. By this means the prosecution and punishment by courts of those crimes are placed in their proper perspective. In addition it is hoped that the reader will thereby be able to appraise both the merits and the limitations of the judicial response.

1 THE FAILURE OF INTERNATIONAL SANCTIONS BY STATES

It has become a truism that, after the demise of the Cold War, the growing disparity between rich and poor, increasing poverty and hopelessness, as well as nationalism, religious fundamentalism, and ethnic and religious hatred, have spawned violence, ethnic cleansing, and bloodshed. Internal conflicts have mushroomed. One of the striking features of the present-day international community, however, is the failure of collective bodies to discharge their function of preventing or punishing large-scale serious violations of human rights amounting to international crimes. The UN Security Council is mandated, under Chapter VII of the UN Charter, to deal with threats to, or breaches of, international peace and security. Often such threats or breaches may and indeed do result from, among other things, serious crimes. In recent years, however, the Security Council has, more than ever before, proved unable to deal with major international crises and keep up with the staggering increase in global violence. No one can contest its inability to react promptly and effectively, and to put a stop to massacres amounting to serious threats to the peace or breaches of the peace. Somalia, the former Yugoslavia including Kosovo, Sierra Leone, Ethiopia and Indonesia, the Middle East, and so on.

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International law we are discussing are normally breaches of precisely such community obligations. A strong reaction by States to these breaches presupposes the existence of community interest to put a stop to them. However, the community interest in their fulfilment remains potential rather than real. States continue to pursue short-term national interests rather than global human values. It follows that they are disinclined to intervene in order to stop blatant infringements of community values. That is to say, community obligations, which reflect progress in the world community towards a Kantian model, remain an ideal whereas, in fact, States tend to cling to the Grotian, additional paradigm.³

1.2 OTHER RESPONSES TO ATROCITIES

Faced with the problem of how to stem rampant violence in the world community, and given the failure of international collective or individual 'sanctions', a gradual and has emerged to resort to a variety of fallback solutions. Various reactions, mechanisms, and devices can be discerned.

2.1 GENERAL

States, groups, and individuals may react in many different ways to gross atrocities and international crimes. Whenever a collective, institutional response is lacking, or is demanded by the victim community to be utterly insufficient, there is often resort to revenge. Revenge is undoubtedly a primitive form of justice, a private system of law enforcement, already condemned in the Bible (in Genesis, 4: 8-13, it is God, or in other words the centralized authority, that punishes Cain for the murder of his brother Abel and, in addition, enjoins all others not to kill or attack him for the murder). It has an altogether different foundation from justice: an implacable logic of retribution and retaliation. Revenge can only be the last resort for persons who have been denied due process, as is shown by what occurred after the First World War in the case of the Armenians (who took justice into their own hands to punish in 1921-2 those whom they regarded as responsible for the Armenian genocide of 1915).

Another possible response, often resorted to, is *forgetting* through the granting of amnesties or by allowing crimes which have never been judged to slide into oblivion. Forgetting beguiles future dictators or authoritarian leaders into counting on impunity. In addition, forgetting means that the victims are murdered twice: first, when they are exterminated physically, and thereafter when they are forgotten. Furthermore, the memory of massacres and other atrocities is never really buried along with the victims. Like an open wound, it lingers and, if untreated, festers. Clearly, when large-scale crimes are perpetrated in a State, an end must be put to the ensuing predicament. Conversely, *bringing alleged culprits to trial* or at any rate *before a public quasi-judicial*

³ See Cassese, *op. cit.*, at 18 (and references given there).

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authority has the following merits. First, trials or public proceedings establish individual responsibility over the collective assignment of guilt. Secondly, they dissipate the call for revenge, because, when the courts or other public bodies mete out the right punishment to the perpetrator, the victim's call for retribution is met. Thirdly, by dint of the dispensation of justice, victims may be prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their actions. And, fourthly, a reliable record of atrocities is established, so that future generations may be made fully aware of the events, and remember the victims.

1.2.3 SPECIFIC RESPONSES

A. The exercise by State courts of jurisdiction on grounds of territoriality or nationality

The normal response to atrocities, albeit 'more honoured in the breach than in the observance', is to bring the alleged perpetrators to justice in the courts of the State where the crimes were perpetrated, or of the State of nationality of the alleged perpetrator. This response does not target the State for blame, but rather the individuals (State officials or persons acting in a private capacity) who allegedly perpetrated the atrocities. This is in contrast to the approach taken when international enforcement agencies seek to impose respect for international values upon the State where atrocities have been committed, in which situation the State itself is stigmatized and sanctioned.

Gradually also the State of which the victims have the nationality (under the *passive nationality* principle) have begun to exercise jurisdiction, especially with regard to war crimes (see 3.1–4). However, initially there was resistance to such assertion of jurisdiction, particularly if the crime had been committed in the State of active nationality or on the high seas, as evidenced by the famous *Lotus* case, decided in 1927 by the Permanent Court of International Justice (France had opposed the exercise of the passive nationality principle by Turkey for a common crime committed on the high seas, but the Court found it was wrong). Another significant case is *Shimoda*. Since neither the State of active nationality (that is the USA) nor any international body had pronounced upon the lawfulness of the atomic bombing of Hiroshima and Nagasaki, in *Shimoda* in 1963 a group of survivors sued the Japanese Government before the Tokyo District Court (the forum of the territorial State and of passive nationality). They claimed compensation for damages (no issue of criminal liability was raised; this was patently a case of civil litigation). They argued that they could not sue either President Truman or the US Government before the courts of the USA, because in the US legal system both the highest executive organs of the State, including the President, and the State itself were covered by the doctrine of sovereign immunity whereby neither the State nor State officials may incur liability for damages for unlawful acts performed in their official capacity, a doctrine similar in effect to the principle in England that 'the King can do no wrong'. The plaintiffs thus contended before the Tokyo court that they had had to turn to Japanese courts for justice. It was their



mission that by the peace treaty of 1952 with the USA the Japanese Government unlawfully waived its rights and claims and those of its nationals, against the US Government, including claims for compensation for the illegal atomic bombing. The Court pronounced the atomic bombing illegal, although in the final analysis it held against the complainants.⁴

Another interesting case is *Yunis*. The defendant was a citizen of Lebanon accused of participating in the hijacking of a Jordanian airliner that resulted in the passengers (including several Americans) being held hostage. He was brought to trial in the US after being arrested at sea by the US authorities. Yunis challenged the jurisdiction of US courts, arguing that there was no nexus between the hijacking and US territory (the aircraft did not fly over US airspace or have contact with US territory). In a judgment of 12 February 1988, the District Court of Columbia dismissed the defendant's motion and affirmed US jurisdiction. It held:

...only is the United States acting on behalf of the world community to punish alleged offenders of crimes that threatened the very foundations of world order, but the United States has its own interest in protecting its nationals.⁵

The assumption by national courts of the task of dealing with atrocities perpetrated abroad

In some countries, courts have been prepared to substitute themselves for national or territorial courts, whenever the latter courts fail to take proceedings against persons suspected or accused of serious international crimes.

The most important case in this respect is *Eichmann*. In its judgment of 29 May 1962, the Supreme Court of Israel dismissed the submissions of the appellant, Eichmann, who claimed that Israeli courts lacked jurisdiction over his alleged crimes because there was no territorial or personal link between those crimes and Israel. In its concluding remarks, the Court held as follows:

...not only do all the crimes attributed to the appellant bear an international character, but the harmful and murderous effects were so embracing and widespread as to shake the national community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of national law and an agent for its enforcement, to try the appellant. That being the case, importance attaches to the fact that the State of Israel did not exist when the offences were committed.⁶

As we shall see *infra* (15.5), more recently the courts of a number of States, chiefly the United Kingdom, Belgium, and to some extent Germany, faced with the failure of the territorial or national State to prosecute and punish international crimes, have begun to replace

⁴Text of the judgment (in English) in L. Friedman (ed.), *The Law of War—A Documentary History* (New York, 1972), vol. ii, at 1688–1702.

⁵681 F. Supp. 896 (DDC), at 903.

⁶See ILR, 36, at 304. It should be noted that Israel was also very influenced by the fact that it was the home of the Jews and the Jews were the victims of the crimes. So there was obviously a clear link between the crimes and the State of Israel, i.e. a sort of passive nationality was de facto an alternative basis for jurisdiction.

those States in fulfilling the prosecutorial function. They have asserted criminal jurisdiction over international crimes committed abroad by foreigners against other foreigners (see, for instance, such celebrated cases as *Pinochet*, *Bouterse*, *Hissène Habré*, *Cavallo* etc.).⁷ It is notable that the trend towards asserting national jurisdiction over extraterritorial crimes accelerated greatly after the establishment of the ICTY and the ICTR. These two international tribunals have given a remarkable push to the institution of national criminal proceedings, and in particular have revitalized the repressive system established by the four 1949 Geneva Conventions, which have for more than forty years remained a dead letter.

The country whose national courts have taken the most vigorous action against crimes committed abroad is—perhaps surprisingly, given its occasionally isolationist tendencies and sceptical attitude towards international law—the United States, although this action has been taken in *civil*, not *criminal*, proceedings. In 1980 civil liberties lawyers, in a landmark case (*Filartiga v. Peña-Inala*), persuaded the federal courts to take from the shelf, dust off, and apply a statute passed in 1789, perhaps originally intended to deal with piracy. This is the Alien Torts Claim Act, under which ‘The [US] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. The US courts have applied this statute to gross violations of human rights perpetrated abroad by foreign State officials against American nationals, thus obliging the culprits to pay compensation for those violations.⁸

No one can deny the significance of these decisions. In most (albeit not all) of these cases, the US courts filled the gap existing both at the international level (no international collective body took action, nor did other States intervene against the State to which the offending officials belonged) and at the domestic level (no authority of the territorial State stepped in). The courts therefore acted on behalf of the international community at large and vindicated rights pertaining to human dignity. In so doing, they proclaimed in judicial decisions some fundamental human values.

However, one should be mindful of the limits of this approach. First, as pointed out above, these are civil cases, where the alleged perpetrator of serious crime is ordered only to pay *compensation*; the defendant is not *convicted* of any crime, even though the evidence discloses—albeit by proof to the civil ‘balance of probabilities’ standard and not to the criminal ‘beyond a reasonable doubt’ standard—the commission of appalling crimes ‘committed in violation of the law of nations’. In addition, the defendant is often abroad when the decision is issued and can easily avoid paying damages as

⁷ For references see *infra*, 15.5.1(B) and 16.3.2.

⁸ Since 1980, the US courts have pronounced in this way on torture in Paraguay (the celebrated *Filartiga* case), political assassination ordered by the Chilean authorities (*Letelier*), torture and racial discrimination for economic gain in Argentina (*Siderman de Blake*), torture, arbitrary arrest, and forced disappearance in Argentina (*Forti v. Suarez-Mason*), torture, summary execution, and forced disappearances in the Philippines (*Marcos*), atrocities in Bosnia and Herzegovina (*Kadić v. Karadžić*, and *Vucković*), torture and arbitrary detention in Haiti (*Avril*), torture in Guatemala (*Gramajo*), torture in Ethiopia (*Negewo*), the terrorist bombing of a Pan Am aircraft over Lockerbie in Scotland (*Al-Megrahi and Fhimah*) and atrocities in Salvador (*Garcia and Vides Casanova*).

red by the Court. The decision therefore ends up being purely symbolic. Secondly, as these are cases involving purely civil litigation, and as the defendant is usually absent, no in-depth examination of the evidence takes place. Thirdly, this trend has occurred in one country only. There is a danger that the courts of one country will set themselves up as universal judges of atrocities committed abroad. This type of 'humanitarian imperialism' may give rise to concern. On its own this might not be a problem, if it did not go hand in hand with the tendency of the US government to take upon itself the task of policing the world.

making international treaties imposing upon contracting States the obligation to exercise jurisdiction

States have considered it advisable to strengthen national criminal jurisdiction over international crimes by drafting multilateral treaties concerning matters such as crimes, torture, and terrorism. These treaties impose an obligation on contracting States to pass legislation for the exercise of criminal jurisdiction (often in the form of universal jurisdiction) over such crimes. The four Geneva Conventions of 1949, as amended by the two Additional Protocols of 1977, as well as the 1984 UN Convention against Torture and various conventions on terrorism come to mind. They provide that the courts of each contracting State can, and indeed *must*, exercise jurisdiction over crimes perpetrated on their territory or abroad, when the alleged offender is on their territory (so-called *forum deprehensionis*). If they choose not to prosecute the offender, they must surrender him to any other State concerned (*aut dedere aut sequi* principle) or, as in the case of the four Geneva Conventions, they must prosecute the alleged offender to trial, or otherwise hand him over to a State concerned (*aut dedere aut sequi*).

On the strength of one of these treaties, the Torture Convention, that in 1999 the House of Lords held that the UK courts had jurisdiction over the crimes allegedly committed by Pinochet and could therefore extradite him to the UK for judgment of 24 March 1999, so-called *Pinochet 3*). It is also by virtue of this Convention that the former Chadian dictator Hissène Habré was arrested and taken to trial in Senegal for the alleged torture of Chadians (although he was eventually released, on rather legalistic grounds) (see *Hissène Habré*), and French courts asserted jurisdiction over a case concerning a Rwandan priest accused of crimes as well as crimes against humanity and genocide (see *Munyeshyaka*, at 7).⁹ Unfortunately, the application of these treaties by national courts remains sporadic. In addition, it is sometimes subject to the vagaries of political interest.

establishment of Truth and Reconciliation Commissions

certain historical circumstances (when a repressive political regime that perpetrated massive violations of human rights including crimes against humanity, after

⁹ See also *Ilinskiy Vladimir and others* (at 450).

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collapsing or being ousted from power, is replaced by a democratic government bent on promoting reconciliation while not prepared to brush aside past abuses) there is an important alternative option to the ignominy and jeopardy of criminal proceedings. This is fact-finding followed by forgiveness, through the establishment of *Truth and Reconciliation Commissions*. These commissions have been set up since the early 1980s in many Latin American countries (Argentina, Bolivia, Chile, Uruguay, El Salvador, Haiti, etc.), as well as in such African countries as Uganda and South Africa), some as a result of UN action or with UN support. They normally consist of State organs charged with: (i) gathering evidence about gross violations (in particular, through testimony of victims and, if possible, confessions of perpetrators), (ii) investigating the general social, economic, and political causes of the violations, (iii) compiling a public report containing a detailed account of the findings, with possible recommendations. The South African Commission (1995–8) stands out, for, in addition to those tasks, it was endowed with quasi-judicial powers. In particular, it exhibited some significant and novel features: (i) it had the power to grant amnesty to individual perpetrators on condition that they had made full disclosure of crimes 'associated with a political objective' and, if possible, had also testified on crimes perpetrated by others and, if need be, had paid compensation to the victims; (ii) it was empowered to recommend the criminal prosecution of perpetrators brought before it, as an alternative to granting amnesty or simply hearing the case; (iii) it had powers of subpoena and search and seizure, thereby being able to carry out thorough investigations, and the power directly to question witnesses, including those implicated in violations, who had not applied for amnesty; (iv) the hearings were public, thus enabling the public to become cognizant of facts before the issuance of the Commission's final report; and (v) it created a significant witness protection programme, which enabled witnesses to come forward with information the possession of which might otherwise have put them at risk.

The advantages of these Commissions as a way of reacting to atrocities are evident: they (i) further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization; (ii) promote a kind of historical catharsis, through public exposure of crimes; (iii) delve into the historical, social, and political roots of the crimes; (iv) establish a historical record of the atrocities committed; and (v) prevent or render superfluous long trials against thousands of alleged perpetrators.

Nonetheless, the flaws of most of these Commissions should not be underestimated. In many cases they have proved unable to bring about true reconciliation. In addition, even when they have identified the culprits (a relatively rare occurrence), the crimes they have committed are usually cancelled through amnesty laws, or else the offenders are granted pardons exempting them from the punishment for the crime perpetrated. Even the fairer and much more effective Commission established in South Africa in 1995 did not always bring about real and lasting reconciliation. In many cases the Commission pardoned the authors of horrific crimes, whether Afrikaners or members of the ANC. Thus it sparked much

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ment and anger among the victims and their relatives, who desired retribution, at least ordinary criminal justice.

The establishment of international criminal tribunals or so-called internationalized or mixed courts

Another way of reacting to atrocities is by the establishment of international criminal tribunals entrusted with the task of trying those responsible for serious atrocities and other international crimes. In 1993, one of the decisions taken by the UN Security Council, which had been unable to stop the war in the former Yugoslavia while States were unwilling to take action such as air strikes, was to set up the International Criminal Tribunal for the former Yugoslavia (ICTY). The following year it established the International Criminal Tribunal for Rwanda (ICTR). In 1998, the Statute of the International Criminal Court (ICC) was adopted in Rome, and in 2002 the UN and Sierra Leone entered into an agreement for the establishment of the Special Court for Sierra Leone. In addition, both in Kosovo and in East Timor international organizations set up mixed courts, that is courts composed of both local and international judges (see *infra*, 20.5). It is hoped that such courts will also be set up in Cambodia.

The promotion of the extraterritorial jurisdiction of international courts and human rights monitoring bodies, over serious violations of human rights

A significant reaction to the proliferation of callous and atrocious crimes in the world led to an interesting development: international bodies have gradually extended, by way of interpretation, the territorial reach of international obligations concerning human rights, incumbent upon States. In this way, such bodies have come to assert a right to pronounce on and, if need be, condemn or stigmatize massive violations committed by a State or its officials *abroad*, i.e. outside the territorial jurisdiction traditionally considered as delimiting the State's responsibilities.

Put this development in context, it should be noted that when States undertake obligations in the area of human rights, they tend to view those obligations as applying only to individuals within their own territory. In other words, they construe these obligations as having a strictly *territorial* scope. This, for instance, was the interpretation most commentators tended to place on Article 2 of the UN Covenant on Civil and Political Rights, whereby 'Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

However, international bodies responsible for scrutinizing compliance with human rights standards have increasingly interpreted these obligations as also having *extraterritorial* scope. In other words, the States that are bound by international obligations concerning human rights are obliged to respect those obligations not only when their officials act on the State's own territory, but also when they take action abroad. Thus, for example, in 1995 the UN Human Rights Committee, in commenting on a report submitted by the USA, noted that it could not share the view of the US

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Government that the UN Covenant on Civil and Political Rights lacked extraterritorial reach under all circumstances. Such a view—it went on to point out—is ‘contrary to the consistent interpretation of the Committee on this subject that, in special circumstances, persons may fall under the subject matter jurisdiction of a State party even when outside that State territory’.¹⁰ More specifically, in *Delia Saldías de Lopez v. Uruguay*, the Committee had already ruled that Uruguay had violated the Covenant when its security forces had abducted and tortured in Argentina a Uruguayan citizen living there. It held that indeed a State is also accountable for human rights violations perpetrated by its agents abroad.¹¹

In an important case, *Loizidou v. Turkey*, the European Court of Human Rights carried this doctrine even further. The question had arisen of whether the denial by Turkish armed forces stationed in Northern Cyprus of access by the applicant (a Cypriot) to her property in Northern Cyprus, if imputable to Turkey, fell under Turkey’s jurisdiction pursuant to Article 1 of the European Convention on Human Rights. The Court gave an affirmative answer. In its decision on preliminary objections, it held that a State could be held responsible for violations of human rights committed by its officials abroad. In its decision on the merits, the Court then ruled that what mattered for establishing whether Turkey was responsible was the question of whether Turkey had effective or overall control of the armed forces stationed in an area outside its national territory.¹² However, in a recent decision in *Banković and*

¹⁰ UN Doc. CCPR/C/79/Add 50 (1995), §19.

¹¹ It pointed out that: ‘The reference in Article 1 of the Optional Protocol to “individuals subject to its jurisdiction” does not affect the above conclusion [that the Covenant also covered crimes perpetrated by Uruguayans acting on foreign soil] because the reference in that Article is not to the place where the violations occurred, but rather to the relationship between the individuals and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. Article 2.1 of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction”, but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it . . . In line with this, it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory’. (Decision of 29 July 1981 (Communication No. 52/1979), in Human Rights Committee, *Selected Decisions (Second to Sixteenth Sessions)* (1985) 91, §§12.2–12.3.)

¹² It noted that: ‘[T]he Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of “jurisdiction” under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention . . . In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.

‘Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

‘In this connection the respondent Government have acknowledged that the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the

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thers, the Court has somewhat restricted the scope of its doctrine of the extraterritorial reach of the Convention's provisions, by insisting among other things on the regional dimension of such reach.¹³

The Inter-American Commission of Human Rights spelled out the doctrine forcefully in *Coard v. US*. The question at issue was whether the USA could be held responsible for violating the 1948 American Declaration of the Rights and Duties of Man for allegedly holding incommunicado and mistreating 17 Grenadian nationals in Grenada in October 1983, when US and Caribbean armed forces invaded the island, deposing the 'revolutionary government'. In its report of 29 September 1999, the Commission replied in the affirmative. (Its task was however facilitated by the fact that the American Declaration, like the 1948 Universal Declaration, does not contain a clause stipulating that its provisions apply only to persons subject to the jurisdiction of the relevant State.)¹⁴

It should be noted that this case law is consistent with the object and purpose of human rights obligations, which aim to protect individuals against arbitrariness, abuse, and violence, regardless of where the State's actions were carried out.

It follows from the above that States must respect human rights obligations not only on their own territory but also abroad. In exercising authority abroad, they must respect the human rights of all individuals subject to their authority. In this context, 'exercise of authority' means not only the display of sovereign or other powers

establishment there of the [Turkish Republic of Northern Cyprus]. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.

'It follows that such acts are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 of the Convention.' (ECHR (1995) Series A, No. 310, at §62; *Merits*, ECHR, 18 December 1996, *Reports* 1996-VI) 2230, at §57.)

¹³ The Court noted that: 'the case-law of the Court demonstrates that its recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government' (§71). The Court dismissed the applicants' submissions as 'tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that state for the purpose of Article 1 of the [European] Convention [on Human Rights]' (§75). The Court concluded that the European Convention 'is a multilateral treaty operating in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention is not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for specific circumstances, would normally be covered by the Convention.' (§80.)

¹⁴ The Commission noted that: 'Given that individual rights inhere simply by virtue of a person's human-ness each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a State's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one State, subject to the control of another State—usually through the acts of the latter's agents abroad. In principle, inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.' (Case No. 10.951, Report No. 109/99, 29 September 1999, §37.)

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(law-making, law-enforcement, administrative powers, etc.) but *any* exercise of power however limited in time (for instance, the use of belligerent force in an armed conflict which of course would be covered by international humanitarian law).

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2

FUNDAMENTALS OF INTERNATIONAL CRIMINAL LAW

THE NOTION OF INTERNATIONAL CRIMINAL LAW

International criminal law is a body of international rules designed both to proscribe international crimes and to impose upon States the obligation to prosecute and at least some of those crimes. It also regulates international proceedings for punishing and trying persons accused of such crimes. The first limb of this body is *substantive* law. This is the set of rules indicating what acts amount to international crimes, the subjective elements required for such acts to be regarded as such, the possible circumstances under which persons accused of such crimes nevertheless not be held criminally liable, as well as on what conditions States must, under international rules, prosecute or bring to trial persons accused of those crimes. The set of rules regulating international proceedings, that is *procedural* criminal law, governs the action by prosecuting authorities and the various types of *international* trials.

Traditionally, especially in the French, German, Italian, and Spanish legal tradition, international criminal law is distinguished from another branch of law, called 'criminal international law' (*droit pénal international*), the whole area concerning the role of national courts in international criminal law, that is the grounds of jurisdiction asserted by national courts to adjudicate international crimes, the law applied by national courts to pronounce upon such crimes, as well as interstate judicial co-operation for the repression of criminal crimes, including extradition. Instead, it is suggested here that a modern conception of international criminal law should also take into account various fundamental questions relating to the role played by national courts in international criminal law, on the basis of that: (i) national courts have powerfully contributed to the development of international criminal law, as we shall soon see; (ii) at present international courts and tribunals duly take into account national case law and the way national courts apply national law when pronouncing upon international crimes; (iii) international courts must perforce rely upon State co-operation if they wish to fulfil their mandate fully (see *infra*, 19.4 and 22.23); hence the issue of co-operation of States with themselves in the area of international crimes, as well as with international

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criminal courts is central to this branch of law; (iv) the fact that the International Criminal Court (ICC) is grounded on the principle of complementarity (see *infra*, 19.7), that is, only adjudicates cases when national courts are unable or unwilling to pronounce upon them, makes it imperative for the ICC to be fully cognizant of the legal framework of national courts' judicial action when they sit in judgment over international crimes.

Consequently, in this book we will also discuss the legal grounds of jurisdiction over international crimes, asserted by *national* courts, the possible obstacles to national adjudication of those crimes, as well as other problems relating to co-operation between States and between States and international courts and tribunals.

2.2 GENERAL FEATURES OF INTERNATIONAL CRIMINAL LAW

International criminal law is a branch of *public international law*. The rules making up this body of law emanate from sources of international law (treaties, customary law, etc.).¹ Hence, they are subject, among other things, to the principles of interpretation proper to that law. However, one should not be unmindful of some unique features of international criminal law.

First, it is a *relatively new branch of international law*. The list of international crimes, that is of the acts for whose accomplishment international law makes the authors criminally responsible, has come into being by gradual accretion. Initially, in the late nineteenth century, and for a long time, only war crimes were punishable. (Piracy, traditionally considered an international crime, is not discussed in this book for, in addition to having become obsolete, it does not meet the requirements of international crimes proper; see *infra*, 2.3) It is only since the Second World War that new categories of crimes have developed, while that of war crimes has been restated: in 1945 and 1946, the Statutes of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE), respectively, were adopted, laying down new classes of international criminality. Thus, in 1945 crimes against humanity and against peace were added, followed in 1948 by genocide as a special subcategory of crimes against humanity (soon to become an autonomous class of crimes), and then in the 1980s, by torture as a discrete crime. Recently, international terrorism has been criminalized, subject to certain conditions. As for rules on international criminal proceedings, they were first laid down in the Statutes of the IMT and the IMTFE, then in those of the ICTY and the ICTR and more recently in the Rome Statute of the ICC. Nonetheless they are still scant and, what is even more important, they only pertain to the specific criminal court for which they have been adopted, that is, they have no general scope. A

¹ For a succinct survey of these sources, I take the liberty of referring the reader to my book, *International Law*, cit., 117-61.

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fully-fledged corpus of generally applicable international procedural rules is only gradually evolving.

Secondly, international criminal law is still a very *rudimentary* branch of law. The gradual broadening of substantive criminal law has been a complex process. Among other things, when a new class of crime has emerged, its constituent elements (the objective and subjective conditions of the crime, or, in other words, *actus reus* and *mens rea*) have not been immediately clear. Nor has any scale of penalties been laid down in international rules. This process can be easily explained. Three main features of the formation of international criminal law stand out.

The first is that, for a long time, either treaties or (more seldom) customary rules have confined themselves to *prohibiting* certain acts (for instance, killing prisoners of war or civilians), without however adding anything on the criminal consequences of such acts; in other words, they simply laid down prohibitions without providing for the criminal nature of breaches of such prohibitions, let alone the conditions for their criminal repression and punishment.

Furthermore, when international law has moved on to criminalize some categories of act (war crimes, crimes against humanity, etc.), it has left to *national courts* the task of prosecuting and punishing the alleged perpetrators of those acts. As a consequence, municipal courts of each State have applied their procedural rules (legal provisions on jurisdiction and on the conduct of criminal proceedings) and rules on 'the general part' of substantive criminal law, that is, on the definition and character of the objective and subjective elements of crimes, on defences, etc. Among other things, very often national courts, faced with the *indeterminacy* of most criminal rules, have found it necessary to flesh them out and give them legal precision. They have thus refined provisions initially left rather loose and woolly by treaty or customary law.

Finally (and this is the third of the features referred to above), when international criminal courts were set up (first in 1945-7, then in 1993-4 and more recently in 1988), they did indeed lay down in their Statutes the various classes of crimes to be punished; however, these classes were conceived of and couched merely as offences for which each court had jurisdiction. In other words, the crimes were not enumerated as in a criminal code, but simply as a specification of the jurisdictional authority of the relevant court. The value and scope of those enumerations was therefore very germane to the court's jurisdiction and did not purport to have a general character.

Given these characteristics of the evolution of international criminal law, it should be surprising that even the recent addition of the sets of written rules referred to above has not proved sufficient for building a coherent legal system, as is shown by the heavy reliance by the newly created *international* courts upon customary rules or written general principles.

As for *procedural* law, it was scantily delineated in the Statutes of the IMT and the ICTY Tribunal. Only recently has it been fortified, when the UN Security Council adopted such international instruments as the Statutes of the ICTY, in 1993 and the ICC, in 1994 and subsequently the judges of these two tribunals adopted their

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respective Rules of Procedure and Evidence (RPE). Then, in 1998, States agreed upon the Statute of the ICC and the Rules of Procedure and Evidence for the Court. Nonetheless, even procedural law remains at a rather underdeveloped stage.

Thirdly, international criminal law presents the unique characteristic that, more than any other segment of international law, it simultaneously *derives its origin from* and continuously *draws upon* both *human rights law* and *national criminal law*.

Human rights law, essentially consisting of international treaties and conventions on the matter, as well as the case law of international bodies such as the European Court of Human Rights, has contributed to the development of criminal law in many respects. Thus, it has expanded or strengthened, or created greater sensitivity to, the values to be protected through the prohibition of attacks on such values (human dignity, the need to safeguard life and limb as far as possible, etc.). Furthermore, human rights law lays down the fundamental rights of suspects and accused persons, of victims and witnesses; it also sets out the basic safeguards of fair trial. In short, this increasingly important segment of law has significantly impregnated the whole area of international criminal law.

In addition, most customary rules of international criminal law have primarily evolved from *municipal case law* relating to international crimes (chiefly war crimes). This element as well as the paucity of international treaty rules on the matter explain why international criminal law to a great extent results from the gradual *transposition* on to the international level of rules and legal constructs proper to national criminal law or to national trial proceedings. The grafting of municipal law notions and rules on to international law has not however been a smooth process. National legal orders do not contain a uniform regulation of criminal law. On the contrary, they are split into many different systems, from among which two principal ones emerge: that prevailing in common law countries (the UK, the USA, Australia, Canada, many African and Asian countries), and that obtaining in civil law countries, chiefly based on a legal system of Roman-German origin (they include States of continental Europe, such as France, Germany, Italy, Belgium, the countries of Northern Europe such as Norway, Sweden, Denmark, as well as Latin American countries, and many African and Asian States including for instance China). The heterogeneous and composite origin of many international rules and institutions of both substantive and procedural criminal law, a *real patchwork of normative standards*, complicates matters, as we shall see.²

² This, as already noted above, in particular applies to the so-called 'general part of criminal law', that is the set of rules regulating the subjective elements of crimes, the various forms or categories of criminal liability (for instance, joint responsibility for common criminal purpose, aiding and abetting, and so on), conditions excluding criminal liability, etc. It was only natural for each national court pronouncing on war crimes or crimes against humanity to apply the general notions of criminal law prevailing in that country. As a result, one is confronted with hundreds of national cases where judges have relied upon different conceptions of, or approaches to, the 'general part', or have even resorted to the national definition of some subjective or objective elements of the relevant international crime. For instance, in *Fröhlich*, a British Court of Appeal (established in Germany under Control Council Law no. 10), to satisfy itself that the offence of the accused (a German charged with and convicted by a Court of first instance of killing four Russian prisoners of war) amounted to a war crime consisting of murder, applied the German notion of 'murder' (at 280-2).

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follows that international criminal law is an essentially *hybrid branch of law*: it is a branch of international law impregnated with notions, principles, and legal constructs derived from national criminal law and human rights law. However, the recent establishment of international criminal tribunals, and in particular of the ICC, has given a tremendous impulse to the evolution of a corpus of international criminal rules and principles. It can therefore be safely maintained that we are now heading for the creation of a fully fledged body of law in this area.

Fourth major feature of international criminal law, in particular of substantive international law, which is closely bound up with the feature to which I have just drawn attention, ought to be emphasized. This law has a *twofold relationship* with the general law of public international law.

The first relationship is one of *mutual subsidiarity or support*. Strikingly, most of the offences that international criminal law proscribes and for the perpetration of which it endeavours to punish the individuals that allegedly committed them, also regarded by international law as particularly serious violations *by States*: they are international delinquencies entailing the 'aggravated responsibility' of the State on whose behalf the perpetrators may have acted.³ This holds true not only for crimes against humanity, torture, terrorism, but also for war crimes. When one of these crimes is committed by an individual not acting in an official capacity, a dual responsibility may follow: criminal liability of the individual falling under international criminal law, and State responsibility, regulated by international rules on this matter.⁴ Admittedly, there is at present a tendency in the international community to give pride of place to the former category of individual liability whilst playing down or neglecting the latter. Political motivations underlie this trend, chiefly the inclination of States to avoid invoking the aggravated responsibility of other States except when they are prompted to do so out of self-interest or on strong political grounds. It is nevertheless a fact that theoretical and legal avenues remain open and may be utilized, as is shown by the proceedings for genocide recently instituted by some States before the International Court of Justice⁵ while at the same time genocide trials are taking place before the

³ notion of 'aggravated State responsibility' see Cassese, *cit.*, at 200–11.

⁴ It is notable that the four Geneva Conventions of 1949, while they institute a special legal regime for the repression of 'grave breaches' of the Conventions, at the same time provide for the 'State responsibility' of the Parties for the case of commission of such 'grave breaches'. See for instance Articles 129–30 of the Fourth Geneva Convention (on Prisoners of War), concerning the penal sanctions for 'grave breaches' and on State responsibility. (Under the latter provision, 'No High Contracting Party shall be allowed to exempt itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article'.)

⁵ The case brought by Bosnia and Herzegovina against the Federal Republic of Yugoslavia (*Application for Intervention on the Prevention and Punishment of Genocide*).

⁶ For instance, the judgment in *Krstić* (2 August 2001) as well as the indictments against *Milošević* (11 November 2001 and 22 November 2001), as well as the revised indictment against *Kazadžić* of 10 October 2001.

The second relationship between public international law and international criminal law is more complex. Two somewhat *conflicting philosophies* underlie each area of law. International criminal law aims at protecting society against the most harmful transgressions of legal standards of behaviour perpetrated by individuals (whether they be State agents or persons acting in a private capacity). It therefore aims at the punishment of the authors of those transgressions, while however safeguarding the rights of suspects or accused persons from any arbitrary prosecution and punishment. It follows among other things that one of the mainstays of international criminal law is the *exigency* that its prohibitions be as clear, detailed, and specific as possible. Furthermore no one should be punished for conduct that was not considered as criminal at the time when it was taken. In short, any person suspected or accused of a crime is entitled to a set of significant rights protecting him from possible abuse by the prosecuting authorities.

Public international law, on the other hand, pursues, in essence, the purpose of reconciling as much as possible the conflicting interests and concerns of sovereign States (without however neglecting the interests and exigencies of individuals and non-state entities). True, part of general international law is concerned with both the violations by States of the most fundamental legal standards and the ensuing State responsibility. This area of international law is, however, relatively less conspicuous than the corresponding segment of international criminal law. In fact, the thrust of general international law is legally to regulate and facilitate a minimum of peaceful international intercourse between States, much more than calling to account States for their breaches of law. To put it differently, the *normative* role of law is more important and effective than its *repressive* function. What is even more important from our present viewpoint is that, in order to take account of the conflicting interests and preoccupations of States, the law-making process is often actuated by dint of gradual evolution of general and often *loose* rules through custom or even so-called 'soft law' (that is, standards and guidelines devoid of legally binding force). Often even treaties do not lay down unambiguous and specific provisions; this happens whenever the need to reconcile conflicting State interests makes it necessary to agree upon vague formulas. In short, the need for detailed, clear, and unambiguous legal regulation is less strong in the general area of public international law than in the specific area of criminal law, where this need becomes of crucial relevance, given that the fundamental rights of suspects or accused persons are at stake.

The inherent requirements underlying international criminal law (not less than any national body of criminal law) may therefore collide with the traditional characteristics of public international law, which, as we have just stated, still relies to a large extent upon custom. In this respect international criminal law bears a strong resemblance to the criminal law of such common law countries as England, where next to statutory offences there exist many common law offences, developed through judicial precedents. However, there the existence of a huge wealth of judicial precedents built up over centuries, and above all the hierarchical structure

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The failure to command respect for international law relates not only to the resort to force proper. It also concerns the adoption of *economic sanctions*, which in principle was conceived of as a fallback position for the Security Council, but in practice has become one of the major means available to international organs to impose peace and security and, if need be, induce compliance with international rules. These sanctions, however, normally prove ineffective or carry little weight; frequently they are unfair and counterproductive. Although they are intended as a reaction to wrongdoings done by the State officials responsible for the international delinquencies, they target the State as such and therefore often end up adversely affecting, or at any rate having a negative knock-on effect on, the civilian population or other innocent persons.

As stressed above, under the UN Charter the Security Council is competent only to deal with international crises likely to jeopardize or endanger international peace and security. The Security Council is not expected to handle relatively 'minor' conflicts, which consequently fall within the province of the States concerned. In other words, the settlement of crises resulting from gross human rights violations amounting to crimes may often be left to the States directly affected by the friction or conflict. (Of course the SC can step in when the situation arises solely *within* a State but nonetheless is of such a nature as to threaten international peace and security, i.e. because of spill-over effects such as floods of refugees, or because the atrocities are inflaming world public opinion, as in Rwanda and Kosovo, thereby destabilizing the region or international public order.)

In addition, individual States have had scant, if any, resort to one particular legal weapon which is available as a response to gross violations of human rights and other atrocities, namely, *peaceful reprisals*, currently termed *countermeasures*. (These include the suspension or termination of commercial treaties or treaties granting special rights to nationals of the offending State, trade embargoes, freezing or seizure of assets belonging to the foreign State or to its nationals, etc.)

Why do States refrain from taking countermeasures against gross violations of international law? The reason is simple: States tend to resort to countermeasures only when their own interests are at stake and other States have harmed those interests by breaching international law. In other words, States tend to react to the breach of *reciprocal* obligations by other States.¹ In contrast, they are inclined to turn a deaf ear to breaches of international obligations enshrining basic values such as peace, human dignity, and protection of ethnic, religious, or racial groups against extermination, etc. These are what one may call *community obligations*.² They exhibit two basic features: first, they are incumbent upon each and every member of the world community towards all other members; and, secondly, any other member of that community has a correlative right to demand fulfilment of these obligations and, in cases of breach, may be entitled to resort to countermeasures. Plainly, the gross breaches of inter-

¹ On the notion of reciprocal obligations see B. Simma, 'From Bilateralism to Community Interest in International Law', 250 HR (1994-VI), 230-3; A. Cassese, *International Law* (Oxford: Oxford University Press, 2001), at 13-15.

² See Simma, *op. cit.*, at 233-84; Cassese, *op. cit.*, at 15-17.

of the judiciary coupled with the doctrine of 'judicial precedent' (whereby each court is bound by the decisions of courts above), as well as the extrapolation by legal scholars of general principles from that copious case law, tend to a large extent to meet the exigencies of legal certainty and foreseeability proper to any system of criminal law.⁷

The contrast between the relative indeterminacy and 'malleability' of international criminal rules deriving from their largely customary nature, and the imperative requirement that criminal rules be clear and specific, results in the *role of national or international courts* being conspicuously crucial. It falls to courts, both national and international, to try to cast light on, and give legal precision to, rules of customary nature, whenever their content and purport is still surrounded by uncertainty, as well as to spell out and elaborate upon the frequently terse content of treaty provisions. In particular, courts play an indispensable role for (i) the ascertainment of the existence and contents of customary rules, (ii) the interpretation and clarification of treaty provisions, and (iii) the elaboration, based on general principles, of legal categories and constructs indispensable for the application of international criminal rules. It is mainly due to judicial decisions that international criminal law is progressing so rapidly.⁸

Closely bound up with the characteristic just underlined is another major trait of current international criminal law. More than other branches of public international law, but like those legal areas where rapid changes in technology impose speedy normative updating (for instance, the law of the environment or the law of international trade) *international criminal law is changing very quickly*. This is because unfortunately, in the world community there is an increase in the perpetration of atrocities, whether or not linked to armed conflict. There is, therefore, a widely felt need to respond to them by among other things criminal repression. However, what is even more striking in this branch of law is that legal change (i) goes hand in hand

⁷ In 1923 the great British international lawyer J. L. Brierly contested the analogy of international criminal law with English law. In commenting on the notion that an international criminal court to be established would be much in the position of any English court under the English system of building up the law by precedents, he stated that this analogy did not hold: 'For the greater part of English criminal law is now statutory; and in any case the discretionary powers which our law, statutory or not, allows to a judge in defining the constitution of a crime or fixing the sentence is not in the least comparable in extent to the extraordinarily wide discretion which would have to be entrusted to an international criminal court attempting to apply and develop such laws of war as exist at present.' (J. L. Brierly, 'Do we Need an International Criminal Court?', 8 BYIL (1923), at 86-7.)

⁸ These characteristic features of this body of law, have in some respects a negative connotation, while other features may prove advantageous. The drawback is that the rights of the accused risk being jeopardized by the *normative flux* that still characterizes this branch of international law. It is chiefly for courts to endeavour as far as possible to safeguard the rights of the accused from any unwarranted deviation from the fundamental principles of criminal law and human rights law. The advantage of the unique nature of international criminal law is that change and adaptation to evolving historical circumstances occur more easily and smoothly than in legal systems based on codes and other forms of written law. In this respect courts may become instrumental in reconciling the demands for change with the requirement of respect for the rights of the accused.

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with increasing sophistication of the legal system (we are now moving from rudimentary jumble of rules and principles to a fairly consistent body of law) and (ii) is accompanied by a gradual shift in its philosophical underpinning: in particular, a shift from the doctrine of *substantive justice* (whereby the need to protect society requires the punishment of harmful actions even if such actions have not been previously criminalized) to that of *strict legality* (whereby the need to protect individuals' human rights, in particular to safeguard individuals from arbitrary action of the executive or judicial powers, requires that no one may be punished for any action not considered criminal when performed). On this matter see *infra*, 7.3.

Finally, let me stress a significant characteristic of international criminal law which, however, is *not* unique to it. Like most national legal systems, international rules criminalize not only conduct causing *harm* to others (for example, murder, rape, torture, destruction of hospitals, shelling of innocent civilians) but also conduct creating an *unacceptable risk* of harm. The rationale behind this legal regulation is that—as in this area criminal conduct is normally of great magnitude and seriously offends against fundamental values—international humanitarian and criminal rules aim not only at protecting persons as far as possible from unlawful conduct, but also at criminalizing any actions that may carry a serious risk of causing grave harm, that is those rules also have a *preventative* role. This feature of international criminal law manifests itself in three major ways: (i) by also criminalizing the early stage or the preparation of crimes that are then committed, (ii) by the prohibition of so-called inchoate crimes (or preliminary criminal offences), (iii) by the prohibition of specific conduct likely to cause serious risk.⁹

⁹ As for the first aspect, suffice it to stress that international criminal law among other things prohibits *planning*. As for inchoate crimes, it may be sufficient to recall that international rules criminalize *attempt* and (in the case of at least the most serious crime, genocide), *conspiracy* and *incitement* (see *infra*, 9.10–11). All these inchoate offences that constitute the preparatory stage of other offences may be punished even if the crime they are intended to bring about does not in fact occur. Criminalization of these offences is a way of preventing them from occurring, to the extent possible, that is, preventing the perpetration of the crime to which they intend to lead. By criminalizing such conduct, international rules endeavour to forestall the danger that the execution of those offences may cause major harm. They also serve to stigmatize attempting, inciting or conspiring as criminal *in itself*. Thus the message is conveyed that people should not only not commit crimes but also not incite, conspire or attempt such crimes; if they do so, they will be labelled as criminals and punished accordingly. (For this reason, some have criticized these crimes, especially conspiracy, as 'thought crimes', but this is inaccurate as each offence requires some overt conduct in addition to the *mens rea* requirement.)

With regard to the third of the elements referred to, it may be pointed out that criminalization of *risk* occurs any time a criminal rule envisages, among the possible subjective elements of criminal conduct, recklessness or *dolus eventualis* (see *infra*, 8.2–4). Such criminalization may also specifically derive from the specific content of individual provisions. For instance, Article 7 of the Geneva Convention of 1929 on Prisoners of War provided, among other things, that 'As soon as possible after their capture, prisoners of war shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger . . . Prisoners shall not be unnecessarily exposed to danger while awaiting evacuation from a

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2.3 THE NOTION OF INTERNATIONAL CRIMES

International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).

Before considering the various categories of such crimes, it should be specified that international crimes may be held *cumulatively* to embrace the following:

1. Violations of international *customary* rules (as well as treaty provisions, where such provisions exist and either codify or spell out customary law or have contributed to its formation).
2. Rules intended to protect *values* considered important by the whole international community and consequently binding all States and individuals. These values are not propounded by scholars or thought up by starry-eyed philosophers. Rather, they are laid down, although not always spelled out in so many words, in international instruments, the most important of which are the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, the two 1966 UN Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, the American Convention on Human Rights of 1969, the UN Declaration on Friendly Relations of 1970, the 1981 African Charter on Human and Peoples' Rights. Other treaties also enshrine these values, although from another viewpoint: they do not proclaim the values directly, but prohibit conduct that infringes them: for instance, the 1948 Convention on Genocide, the 1949 Geneva Conventions on the protection of victims of armed conflict and their two Additional Protocols of 1977, the 1984 Convention against Torture, and the various treaties providing for the prosecution and repression of specific forms of terrorism.
3. Furthermore, there is a universal interest in repressing these crimes. Subject to certain conditions their alleged authors may in principle be prosecuted and punished by *any State*, regardless of any territorial or nationality link with the perpetrator or the victim.
4. Finally, if the perpetrator has acted in an official capacity, i.e. as a *de jure* or *de facto* State official, the State on whose behalf he has performed the prohibited act is

fighting zone'. (At present a rule corresponding to that provision is Article 23 of the Third Geneva Convention of 1949.)

In 1947 a Dutch Court Martial in Indonesia applied this provision in *Koshiro*. The accused, an officer in the Japanese Navy in charge of Japanese forces at Makassar in the Netherlands East Indies, was charged with among other things unnecessarily exposing a large number of Allied prisoners of war to danger, in that in 1944 a large ammunition depot had been built by the prisoners of war at a distance of about fifty yards from the prisoner of war camp, and stocked with ammunition (the air-raid shelters constructed in the camp were inadequate). The Court Martial found the accused guilty of the charge. The district in which the camp and the depot were situated was several times the immediate target for Allied planes, and as a result 'the ammunition depot might have been hit, with disastrous consequences for the prisoners' (at 211).

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barred from claiming enjoyment of immunity from the civil or criminal jurisdiction of foreign States, accruing under customary law to State officials acting in the exercise of their functions (although, if the State official belongs to a category such as head of State, foreign minister or diplomatic agent and is still serving, then he enjoys complete personal immunity: see *Pinochet*,¹⁰ *Fidel Castro* (Legal Grounds 1–4), and the *Congo v. Belgium* case, §§57–61).

Under this definition international crimes include war crimes, crimes against humanity, genocide, torture (as distinct from torture as one of the categories of war crimes or crimes against humanity), aggression, and some extreme forms of terrorism (serious acts of State-sponsored or -tolerated international terrorism). By contrast, the notion at issue does not embrace other classes.

First of all, it does not encompass piracy (a phenomenon that was important and conspicuous in the seventeenth to the nineteenth centuries). Indeed, as I have tried to show elsewhere,¹¹ piracy was (and is) not punished for the sake of protecting a *community* value: all States were (and still are) authorized to seize, capture, and bring to trial pirates in order to safeguard their *joint interest* to fight a common danger and a consequent (real or potential) damage. This is to some extent supported by the fact that when piracy was committed *on behalf of a State* (and was then called ‘privateering’), there was not universal jurisdiction over it. That shows that the conduct amounting to piracy—which was identical to the conduct amounting to ‘privateering’—was not considered so abhorrent that it was an international crime. After all, piracy could be just a simple matter of theft on the high seas but of course it more usually involved more nasty conduct, like making sailors walk the plank, murder, torture, etc. Probably it was simply because piracy *by definition* occurred outside any State’s territorial jurisdiction that a useful repressive mechanism evolved of allowing all or any State to bring pirates to justice.

Secondly, the notion of international crimes does not include illicit traffic in narcotic drugs and psychotropic substances, the unlawful arms trade, smuggling of nuclear and other potentially deadly materials, or money laundering. For one thing, this broad range of crimes is only provided for in international *treaties* or *resolutions* of international organizations, not in customary law. For another, normally it is private individuals or criminal organizations which perpetrate these offences; States fight against them, often by joint official action. In other words, as a rule these offences are committed *against* States. Usually they do not involve States as such or, if they involve State agents, these agents typically act for private gain, perpetrating what national legislation normally regards as ordinary crimes.

¹⁰ See *Pinochet* (House of Lords, judgment of 24 March 1999), speeches of Lord Browne-Wilkinson (at 112–15), Lord Hope of Craighead (at 145–52), Lord Saville of Newdigate (at 169–70), Lord Millet (171–91) and of Lord Phillips of Worth Matravers (at 181–90).

¹¹ See Cassese, *cit.*, at 15, well as my paper on ‘When May Senior State Officials Be Tried for International Crimes? Some comments on the *Congo v. Belgium* Case’, 13 *EJIL* (2002), at 857–8.

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The list of international crimes also does not include apartheid, provided for in a Convention of 1973 (which entered into force in 1976). It would seem that this offence has not yet reached the status of a customary law crime, probably because it was held that it was limited in time and space. Moreover, the 101 States parties to the Convention do not include any Western country: only two major segments of the international community (developing and Eastern European countries) have agreed to label apartheid as an international crime, whereas another grouping, that of Western States, has refused to take the same view. There is therefore a case for maintaining that under customary international law apartheid, although probably prohibited as a State delinquency, is not however regarded as a crime entailing the criminal liability of individuals. Nevertheless, the fact that Article 7(1)(j) of the Statute of the ICC grants the Court jurisdiction over apartheid and Article 7(2)(h) provides a definition of this crime, might gradually facilitate the formation of a customary rule. This development could occur if and when cases concerning 'inhumane acts' 'committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime' are ever brought before the Court.

2.4 SOURCES OF INTERNATIONAL CRIMINAL LAW

What are the law-making processes from which one can draw the rules making up international criminal law to be applied by *international* criminal courts?

An attempt will be made here to answer this question. The problem of the extent to which the same sources may be used by *national* courts and within what constraints will, however, be left open. In many respects each national legal system provides for its own mechanism for the implementation of international rules. In particular, each system lays down the conditions under which international rules of criminal law may be applied (for instance, in some States, in order for courts to be authorized to pronounce on some international crimes, it is necessary for the legislature to have passed the appropriate legislation defining the crimes and granting courts jurisdiction over them; see *infra*, 16.3.2). In consequence, the system of sources drawn upon by national courts for the purpose of trying persons accused of international crimes is to a large extent bound up with the general manner in which the national system puts international rules into effect. That is not to say that sources of international criminal law vary from State to State; it is simply to say that the way national courts apply this body of law may vary. For instance, courts of all States may and do apply both treaties and international customary law as well as general principles of international law. Nonetheless, depending on the rank of each category of international rules within the national legal system and their status *vis-à-vis* national legislation, treaty rules may prevail over, or be prevailed over, by national laws. (Of course, when courts make national laws conflicting with international rules and the national laws take

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precedence over the international rules, the State may incur international responsibility for a breach of those rules.)

Since international criminal law is but a branch of public international law, the sources of law from which one may derive the relevant rules (i) are *those proper to international law*, and (ii) must be resorted to in the *hierarchical order* dictated by international law.

Hence, one may draw upon primary sources (treaties, customary law), secondary sources (that is, rules produced by sources envisaged in customary rules or treaty provisions), general principles of international criminal law or general principles of law, or in the final analysis such subsidiary sources as general principles of law recognised by the community of States. The order in which one may use such sources (and which at present is to a large extent codified in Article 21 of the ICC Statute), is as follows: one should first of all look for treaty rules or for rules laid down in such international instruments as binding resolutions of the UN Security Council (as is the case for the ICTY and the ICTR), when these treaty rules or resolutions contain the provisions conferring jurisdiction on the court or tribunal and setting out the procedure. When such rules are lacking or contain gaps, one should resort to customary law or to treaties implicitly or explicitly referred to in the aforementioned rules. When even this set of general or treaty rules is of no avail, one should apply general principles of international criminal law (which may be inferred, by a process of induction and generalization, from treaty provisions or customary rules) or, as a fallback, general principles of law. If one still does not find the applicable rule, one may have resort to general principles of criminal law common to the nations of the world.

Let us now consider these various sources in some detail.

2.4.1 THE STATUTES OF COURTS AND TRIBUNALS

Chief among the texts deriving from the Statutes of courts and tribunals are the London Agreement of 8 August 1945, setting out the substantive and procedural law of the IMT of Nuremberg, and the 1998 Statute of the ICC, a long and elaborate instrument that lays down both a list of crimes subject to the jurisdiction of the Court and some general principles of international criminal law, and in addition sets forth the main elements of the proceedings before the Court.

Other international instruments endowed with legally binding force and regulating international tribunals are the resolutions passed respectively in 1993 and 1994 by the UN Security Council to adopt the Statutes of the ICTY and the ICTR. These resolutions, taken on the strength of Chapter VII of the UN Charter, are legally binding on all UN member States pursuant to Article 25 of the UN Charter. They constitute 'secondary' international legislation (in that they have been adopted by virtue of provisions contained in a treaty, the UN Charter).

For the interpretation of these instruments one must rely upon the rules of interpretation laid down in the Vienna Convention on the Law of Treaties. Indeed, in many

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respects these resolutions, and their annexed Statutes, may be equated with international treaties. The ICTY Appeals Chamber upheld this view in a number of decisions.¹²

2.4.2 OTHER TREATIES

Often some provisions of the Statutes of courts and tribunals refer, if only implicitly, to international treaties. For instance, Article 2 of the ICTY Statute, conferring on the Tribunal jurisdiction over grave breaches of the Geneva Conventions of 1949, explicitly refers to these Geneva Conventions with regard to the notion of 'protected persons' and 'protected property'. Article 4 of the ICTR Statute, granting jurisdiction over violations of Article 3 (which is common to the Geneva Conventions) and the Second Additional Protocol, admittedly incorporates only the main provisions of common Article 3 and the Additional Protocol; nevertheless, for its interpretation the Tribunal may need to look at the provisions of the Conventions or of the Protocol.

International treaties may come into play from another viewpoint. By definition treaties are only binding upon the contracting States and any international body they may establish. Nonetheless, they may also be taken into account, whenever this is legally admissible, as evidence of the crystallization of customary rules.

Of course, given the overriding importance of the *nullum crimen* principle (see *infra*, 7.3–7.4), an international court is not allowed to apply treaties other than that conferring on it jurisdiction over certain categories of crimes, if such treaties provide for other categories of crimes. For instance, if the Statute of a court or tribunal grants jurisdiction over crimes against humanity and genocide only, the court or tribunal may not have recourse to a treaty prohibiting war crimes and try an accused for such class of crimes.

Treaties relevant to our subject matter are those laying down substantive rules of international humanitarian law (for instance, the Regulations annexed to the Fourth Hague Convention of 1907, the four Geneva Conventions of 1949, the two Geneva Additional Protocols of 1977, various recent treaties prohibiting the use of certain specific weapons,¹³ and so on), that is, rules the serious violation of which may amount to war crimes. Other treaties refer to other international crimes: for instance, the 1948 Convention on Genocide (the fundamental provisions of which have subsequently turned into customary law); the 1984 Convention against Torture, various international treaties on terrorism, etc.

¹² See for instance *Tadić (Interlocutory Appeal)* (§§71–93) as well as *Tadić (Appeal)* (§§282–6 and 287–305). An ICTY Trial Chamber rightly held in *Slobodan Milošević (decision on preliminary motions)* that 'the Statute of the International Tribunal is interpreted as a treaty' (§47).

¹³ See for instance the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, or the 1980 UN Convention on Prohibitions on Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have Indiscriminate Effects, or the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and their Destruction.

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The rules for *interpreting* treaties are those laid down Articles 31–3 of the 1969 Vienna Convention on the Law of Treaties, which is declaratory of customary international rules on the construction of both treaties and, arguably, of other written rules as well.

2.4.3 CUSTOMARY LAW

As pointed out above, written rules on our subject matter (belonging either to treaties or to other international instruments endowed with normative force, such as binding resolutions of the UN Security Council) are not numerous. Hence, one has frequently to rely upon customary rules or general principles either to clarify the content of treaty provisions or to fill gaps in these provisions. Resort to customary law may also prove necessary for the purpose of pinpointing general principles of criminal law, whenever the application of such principles becomes necessary (see below).

What has been said above, with regard to treaties and the *nullum crimen* principle, also holds true for customary law. A court or tribunal may not apply a customary rule criminalizing conduct that does not fall within one of the categories of crimes over which it has jurisdiction under its Statute.

As noted above, both customary rules and principles may normally be drawn or inferred from case law, which to a very large extent emanates from *national* courts. As each State court tends to apply the general notions of national criminal law even when adjudicating international crimes, it often proves arduous to find views and concepts that are so uniform and consistent as to evidence the formation of an international customary rule. The same holds true for principles.

In addition, differences originating from *different legal approaches* may influence the appraisal by an international judge of the significance of case law. Judges trained in common law systems naturally tend to attach great importance to cases as ‘precedents’ and are inclined to apply such ‘precedents’ without asking themselves whether they evince the formation of, or crystallize, an international customary rule, or instead testify to the proper interpretation of a treaty or customary rule offered by another court. On the other hand, judges from civil law countries, where judicial precedents have lesser weight and criminal codes enjoy great legal status, tend to play down judicial decisions, or at least to first ask themselves, before relying upon such decisions, what legal status should be attached to them in international proceedings. This difference in cultural background and legal training of international judges often leads to different legal decisions.

Many examples may be cited of cases where national or international courts have taken into consideration case law (plus, if need be, treaties and other international instruments) to establish whether a customary rule had evolved on a specific matter. For instance, in *Furundžija* an ICTY Trial Chamber held that a rule on the definition

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of rape had come into being at the customary law level.¹⁴ In a case decided in 1950 the Brussels Court Martial had already ruled that torture in time of armed conflict was prohibited by a customary international law rule.¹⁵

In many cases courts have resorted to customary law to determine the content and scope of an international rule that made a crime punishable without however properly defining the prohibited conduct. For instance, in *Kupreskić and others* an ICTY Trial Chamber had to carefully consider treaties and cases to establish what the prohibition of *persecution* as a crime against humanity meant (§§567–626).¹⁶

In *Tadić (Appeal)* the ICTY Appeals Chamber had to establish whether the doctrine of acting in pursuance of a common criminal purpose covered the case where one of the perpetrators committed an act that, while outside the common design, was nevertheless a foreseeable consequence of pursuing that common purpose or design. After considering various national cases and two international treaties, as well as the legislation of a number of civil law and common law countries, the Court gave an affirmative answer. It noted, however, that since there was no uniformity in the national legislation in the major legal systems of the world (§§204–25), the Chamber could not consider that a general rule had been generated by the general principles of criminal

¹⁴ After noting that rape was prohibited in treaty law, it pronounced as follows: 'The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in Article 44 of the [1863] Lieber Code and the general provisions contained in Article 46 of the Regulations annexed to Hague Convention IV, read in conjunction with the "Martens clause" laid down in the preamble to the Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under Article II(1)(c) of Control Council Law no. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in *Yamashita*, along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common Article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict. It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.' (§§168–9.)

¹⁵ In *K.W.* German officers had been accused of ill-treating civilians in occupied Belgium. After noting that Article 46 of the Hague Regulations imposed upon the Occupant to respect the life of individuals but did not expressly forbid acts of violence or cruelty, the Court Martial held that a customary rule had evolved on the matter. To this effect it relied upon the celebrated Martens Clause as well as Article 5 of the Universal Declaration of Human Rights, concluding that 'hanging a human being by his hands tied behind his back from a pulley specially rigged for the purpose' was torture, whereas 'blows to the face, delivered so repeatedly and violently that they caused it to swell up and, in several cases, broke some teeth' amounted to cruel treatment (at 566). See also *Auditeur v. K.* (at 654).

¹⁶ The Court found that under customary law persecution must contain the following elements: (i) the elements required for all crimes against humanity under the ICTY Statute (namely, to be part of a widespread or systematic attack on the civilian population, etc.); (ii) to be a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5 of the ICTY Statute (on crimes against humanity); and (iii) to be based on discriminatory grounds (§627). Similarly, in *Kunarac and others* an ICTY Trial Chamber held that 'at the time relevant to the indictment', *enslavement* as a crime against humanity was prohibited by customary international law 'as the exercise of any or all of the powers attaching to the right of ownership over a person' (§539). It reached this conclusion after a long survey of treaties and national and international cases (§§518–38).

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law recognized by the nations of the world (§225). Rather, the law on the matter customary in nature:

the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down in [ICTY] Statute and general international criminal law and in national legislation, warrant the conclusion that the case law reflects customary rules of international criminal law (§226.)

In the same case the Chamber upheld the Prosecutor's submissions that the IC Statute did not contain a requirement that crimes against humanity could not be committed for purely personal motives. The Court undertook a careful examination of 'case law as evidence of customary international law' (§§248-69) and concluded that 'the relevant case law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated' (§270).¹⁷

In some cases courts reached the conclusion that, contrary to the submissions of one of the parties, a specific matter was not governed by customary international rules. Thus, for instance, in *Tadić (Appeal)* the ICTY Appeals Chamber held that:

customary international law, as it results from the gradual development of international instruments and national case law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity. (§§288-92.)

Conversely, as pointed out above, in some cases international or national courts following an approach akin to that of common law courts, did not take into consideration case law for the purpose of determining whether it had brought about the crystallization of an international customary rule. Rather, they viewed and used case law as a set of precedents that could be of assistance in establishing the applicable law. (One should, however, note that on a typical common law approach, precedents are *binding*, not merely of assistance. *Obiter dicta* are of assistance, but by definition they are not precedents.)¹⁸

¹⁷ In other words, the Appeals Chamber held for the Prosecution on the Prosecutor's Cross-Appeal that a crime against humanity *could* be committed for purely personal motives, since whether the crime was committed for purely personal reasons or not is irrelevant.

In *Slobodan Milošević (Decision on Preliminary Motions)* an ICTY Trial Chamber concluded that the provision of the ICTY Statute whereby the 'official position' of an accused does not relieve him of criminal responsibility reflected customary international law, as evidenced by numerous treaty provisions on that matter, the adoption by a very large majority of the ICC Statute at the Rome Diplomatic Conference, the adoption by the ILC of the Draft Code of Crimes against the Peace and Security of Mankind, as well as case law (§§26-33).

¹⁸ For instance, in *Kvočka and others* an ICTY Trial Chamber, when discussing the issue of how to distinguish co-perpetrators from aiders and abettors in the case of participation by a number of persons in a joint criminal enterprise, merely relied upon case law as such ('A number of cases assist the Trial Chamber in its assessment of the level of participation required to incur criminal responsibility as either a co-perpetrator or an aider and abettor in a criminal endeavour in which several participants are involved': §290; and see §§291-312).

Perhaps, in *Kvočka and others*, the Chamber was trying to discover the content of international customary law but did not say in so many words that that was what it was doing.

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2.4.4 GENERAL PRINCIPLES OF INTERNATIONAL CRIMINAL LAW AND GENERAL PRINCIPLES OF INTERNATIONAL LAW

General principles of international criminal law include principles specific to criminal law, such as the principles of legality (see *infra*, 7.3), and of specificity (see *infra*, 7.4.1), the presumption of innocence (see *infra*, 21.2), the principle of equality of arms (see *infra*, 21.4.1), etc.¹⁹ The application of these principles at the international level normally results from their gradual transposition over time from national legal systems on to the international order. They are now firmly embedded in the international legal system.

General principles of international law consist of principles inherent in the international legal system. Hence, their identification does not require an in-depth comparative survey of all the major legal systems of the world, but can be carried out by way of generalization and induction from the main features of the international legal order.

By way of illustration, mention may first be made of *Furundžija*. In that case, after surveying international treaties and case law to establish whether there existed any rule of customary international law defining rape, Trial Chamber II embarked upon an examination of national legislation in order to identify a possible common definition of that offence. It concluded that such a common definition did exist, except for one point (whether or not the sexual penetration of the mouth by the male sexual organ amounted to rape), on which a major discrepancy in the various legal systems could be discerned. The Tribunal—it would seem, somewhat contradictorily—held that at this stage it was appropriate to look for ‘general principles of international criminal law or, if such principles are of no avail, to the general principles of international law’ (§182). It then applied the ‘general principle of respect for human dignity’ both as a principle underpinning international humanitarian law and human rights law, and as a principle permeating the whole body of international law (§183). It also applied the general principle *nullum crimen sine lege* (§184), probably as a general principle of criminal law.

Arguably a more consistent and compelling approach was taken in *Kupreškić*

¹⁹ Trial Chamber II of the ICTY, in *Delalić et al.* in 1998 mentioned the *nullum crimen sine lege* and the *nulla poena sine lege* principles, noting that they ‘are well recognised in the world’s major criminal justice systems as being fundamental principles of criminality’ (§402). The Chamber also referred to another ‘fundamental principle’, namely ‘the prohibition against ex post facto criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions’ as well as ‘the requirement of specificity and the prohibition of ambiguity in criminal legislation’ (*ibid.*). The Chamber then pointed out that: ‘the above principles of legality exist and are recognised in all the world’s major criminal justice systems’ (§403). However, the Chamber warned, ‘[i]t is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems’ (§403).

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*et al.*²⁰ The Tribunal applied general criteria, when dealing with the question of determining how a double conviction for a single criminal action should be reflected in sentencing.²¹

2.4.5 GENERAL PRINCIPLES OF CRIMINAL LAW RECOGNIZED BY THE COMMUNITY OF NATIONS

While the general principles just mentioned may be inferred from the whole system of international criminal law or of international law, the principles we will now discuss may be drawn from a comparative survey of the principal legal systems of the world. Their enunciation is therefore grounded not merely on interpretation and generalization, but rather on a comparative law approach.

This source is subsidiary in nature; hence, recourse to it can only be made if reliance upon the other sources (treaties, custom, general principles of international law, rules produced through a secondary source) has turned out to be of no avail. It is at this stage that the search for general principles shared by the major legal systems of the community of nations may be initiated. This is precisely the approach taken in Article 21 of the ICC Statute. Pursuant to this provision resort to the general principles under discussion is the *extrema ratio* for the ICC.

Clearly, a principle of criminal law may belong to this class only if a court finds that it is shared by common law and civil law systems as well as other legal systems such as those of the Islamic world, some Asian countries such as China and Japan, and the African continent. (It is more and more frequently being pointed out in the legal

²⁰ In that case Trial Chamber II held that: '[A]ny time the Statute [of the ICTY] does not regulate a specific matter, and the *Report of the Secretary-General* [submitted to the Security Council and endorsed by it as a document accompanying the resolution establishing the Tribunal] does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice' (§591).

²¹ After finding that no general principle could be garnered from the various legal systems, the Tribunal stated the following: 'Faced with this discrepancy in municipal legal systems, the Trial Chamber considers that a fair solution can be derived both from the object and purpose of the provisions of the Statute as well as the general concepts underlying the Statute and from 'the general principles of justice applied by jurists and practised by military courts' referred to by the International Military Tribunal at Nuremberg' (§717).

The Trial Chamber came back to the same problem when it dealt with the issue of how a Trial Chamber should act in the case of an erroneous legal classification of facts by the Prosecutor. It carefully examined various legal systems for the purpose of establishing whether principles of criminal law common to the major legal systems of the world exist on the matter (§§728–37). The Chamber concluded that no such principle could be found and added: 'It therefore falls to the Trial Chamber to endeavour to look for a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice' (§738).

It then set out two basic, potentially conflicting, requirements (that 'the rights of the accused be fully safeguarded' and that 'the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute or inherent in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice': §§738–9). The Trial Chamber concluded that a careful balancing of these two requirements, as delineated by it, enabled a satisfactory legal solution to be attained (§§742–8). One could note that, in actual practice, rather than applying a general principle or conception of law, the Trial Chamber outlined—others could say crafted—a principle based on such general concepts as fair trial and equality of arms.

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literature that limiting comparative legal analysis to civil law and common law systems alone is too restrictive).²²

International courts have sounded a note of warning about resorting to general principles. They have emphasized that one ought not to transpose legal constructs typical of national legal systems into international law, whenever these constructs do not harmonize with the specific features of the international legal system. The ICTY has taken this approach. Arguably it was in 1998 that a Trial Chamber in *Furundžija* set out the more articulate delineation of the limitations inherent in resort to general principles. After mentioning the need to look for 'principles of criminal law common to the major legal systems of the world' (§177), Trial Chamber II went on to specify the following:

Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since 'international trials exhibit a number of features that differentiate them from national criminal proceedings' [reference is made here to Judge Cassese's Separate and Dissenting Opinion in *Erdemović*, 7 October 1997], account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings. (§178.)²³

International courts have often relied upon these principles. For instance, the ICTY has had the opportunity to resort to this subsidiary source of law in a number of cases. In some cases the ICTY found that there existed general principles common to the major legal systems of the world, and accordingly applied them.

²² This distinction (still to a large extent upheld in such standard works as R. David and C. Jauffret Spinosi, *Les grands systèmes de droit contemporains*, 10th edn (Paris, 1992); as is well known, David divided the legal world into four families: common law, civil law, socialist law, other conceptions of law), is held to be on the wane by such writers as, for instance, Gordely, 'Common Law and Civil Law: eine überholte Unterscheidung', 3 *Zeitschrift für Europäisches Privatrecht* (1993), 498 ff.; Glenn, 'La civilization de la common law', 45 *Revue internationale de droit comparé* (1993), 599 ff.; B. S. Markesinis (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Oxford: Clarendon Press, 1994).

Recently a distinguished author (U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems', 45 *American J. of Comparative Law* (1997), 5–44) has suggested a tripartite scheme: in his view there exist three patterns of law, according to the relative prevalence of 'the rule of professional law', 'the rule of political law' and 'the rule of traditional law'. The 'rule of professional law', which predominates in the Western world (North America, western Europe, South Africa, and Oceania) can be subdivided, in his opinion, into three subsystems: common law, civil law, and mixed systems (such as Scotland, Louisiana, Quebec, South Africa) including the Scandinavian countries (*ibid.*, 41–2).

²³ The same Trial Chamber conclusively enshrined this notion in *Kupreskić et al.* (§677 and see also §539). It held that '[I]t is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law' (§677; see also §539).

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Thus, in *Erdemović* (sentencing judgment of 29 November 1996), Trial Chamber I, in discussing the defences of duress, state of necessity, and superior order, held that 'a rigorous and restrictive approach' to this matter should be taken, adding that such approach was in line with the 'general principles of law as expressed in numerous national laws and case law' (§19). However, it actually relied only on French law and case law (see *ibid.*, n. 13).

In the same case the Trial Chamber set about looking for the scale of penalties applicable for crimes against humanity. It found that among the various elements to be taken into account were 'the penalties associated with [crimes against humanity] under international law and national laws, which are expressions of general principles of law recognised by all nations' (§26). After a brief survey of international practice, it pointed out that '[a]s in international law, the States which included crimes against humanity in their national laws provided that the commission of such crimes would entail the imposition of the most severe penalties permitted in their respective systems' (§30).

However, the Trial Chamber did not give any specific indication of these laws. It then concluded as follows:

The Trial Chamber thus notes that there is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present. (§31.)²⁴

It may be respectfully noted that the Court not only failed to indicate on what national laws it had relied but also omitted to specify whether it had taken into account, in addition to general criminal legislation, national laws on war crimes as well as those on genocide, to establish whether these last laws provide for penalties as serious as those attaching to crimes against humanity. It would therefore seem that the legal proposition set out by the Court does not carry the weight it could have, had it been supported by convincing legal reasoning.

In *Furundžija*, Trial Chamber II was faced with the problem of the definition of one of the categories of war crimes and crimes against humanity, namely rape. After going through international treaties and having considered the relevant case law for the purpose of establishing if it evinced the formation of a customary rule on the matter, the Tribunal stated that no elements other than the few resulting from such examination could be

drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial

²⁴ Subsequently, after surveying the general practice regarding prison sentences in the case law of the former Yugoslavia, the Court found that reference to this practice was 'in fact a reflection of the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity' (§40).

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Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity . . . it is necessary to look for principles of criminal law common to the major legal systems of the world. (§177.)

After undertaking this examination, the Court reached the conclusion that 'in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus' (§181). (However, on one point, namely whether forced oral penetration could be defined rape or sexual assault, the Court found that there was no uniformity in national legislation.)²⁵

Far more numerous are the cases where the ICTY has ruled out the existence of a general principle of law recognised by all nations.²⁶

²⁵ In *Kupreskić and others*, Trial Chamber II took into consideration the question of general principles on a number of occasions. Thus it considered whether there were 'principles of criminal law common to the major systems of the world' outlining the 'criteria for deciding whether there has been a violation of one or more provisions' when the same conduct can be regarded as breaching more than one provision of criminal law (the question of *cumulation of offences*), and concluded that such criteria did exist (§§680–95).

In *Blaškić*, Trial Chamber I held that the principle on the various forms of individual criminal responsibility laid down in Article 7(1) of the ICTY Statute was consonant 'with the general principles of criminal law' as well as international customary law (§264). Subsequently, in appraising the various elements to be considered for the determination of the appropriate penalty, the Chamber held that the 'principle of proportionality' [of the penalty to the gravity of the crime] is a 'general principle of criminal law' (§796).

²⁶ Thus, in *Tadić*, Trial Chamber II rightly excluded a principle whereby *unus testis nullus testis* (one witness is no witness), i.e. a principle requiring corroboration of evidence. It found that this principle was not even universally upheld in civil law systems (§§256, 535–9). In *Erdemović* (appeals judgment of 7 October 1997), Judges McDonald and Vohrah in their Joint Separate Opinion, as well as Judge Li in his Separate and Dissenting Opinion, held that there was no general principle on the question of whether duress can serve as a defence to the killing of innocent civilians (§§46–58 and 4, respectively). Judge Cassese, in his Dissenting Opinion, contended, on the basis of the international case law, that no *special* rule excluding duress as a defence in a case of *murder* had evolved in international criminal law and that, in the absence of such a special rule, the Tribunal had to apply the general rule, which was to recognize duress as a defence without specifying to which crimes it applied and to which crimes it did not. Consequently, and subject to the strict requirements enumerated in his dissent, duress could be admitted as a complete defence even to the crime of killing innocent persons: see §§11–49).

Similarly, in *Tadić* (appeals judgment of 15 July 1999) the Appeals Chamber held that the criminal doctrine of acting in pursuance of a common purpose, although rooted in the national law of many States, did not amount to a general principle common to the major legal systems of the world (§§224–5). In *Kupreskić and others*, Trial Chamber II looked for general principles common to the major systems of the world on the question of how a *double conviction* for a single action must be reflected in sentencing, and concluded that no such principles could be discerned (§§713–16). It reached the same negative conclusion in another area: the specific question of 'how a Trial Chamber should proceed when certain legal ingredients of a charge [made by the Prosecutor] have not been proved but the evidence shows that, if the facts were differently characterised, an international crime under the jurisdiction of the Tribunal would nevertheless have been perpetrated' (§§728–38). The Court therefore held that, lacking a general principle common to the major legal systems of the world, it fell to it 'to endeavour to look for a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice' (§738).

It is also notable that in *Aleksovski*, the Appeals Chamber pointed out that the principle of *stare decisis*, or binding precedent, tended to underpin the general trend of both common and civil law. However, the Appeals Chamber rightly held that in the event the issue was to be settled in light not of a general principle common to the systems of the world, but of international law (§98).

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2.4.6 REGULATIONS AND OTHER RULES OF INTERNATIONAL LAW

International proceedings are normally governed by 'Rules of procedure and evidence' that may be adopted by the international Court itself, by virtue of a provision contained in the Court's Statute (this is the case of the ICTY and the ICTR). The adoption of such Rules is thus provided for in an international instrument (the Court's Statute) adopted on the strength and by virtue of an international treaty (the UN Charter). It follows that the passing of such rules of procedure amounts to 'tertiary legislation.'

In the case of the ICC, under Article 51(1) and (2) it is the Assembly of States Parties that adopts the Rules of Procedure and Evidence by a two-thirds majority. However, under Article 51(3), 'in urgent cases where the Rules [of Procedure and Evidence] do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of the States Parties'. Clearly, in this case, the law-making process leading to the adoption of the Rules constitutes a 'secondary' source of law, for it is envisaged in a treaty (the ICC Statute).

This set of rules must not conflict either with the primary (or 'secondary') legislation governing the same matter (the Statute of the ICTY, the ICTR, and the ICC) or with rules and principles laid down in customary law. In case of inconsistency, a court should refrain from applying the relevant regulation or rule of procedure, or else it must construe and apply them in such a manner that they prove consonant with the overriding rules.²⁷

As for the principles of interpretation, once again they should be those upheld in international law and codified in the Vienna Convention on the Law of Treaties: see to this effect the judgment of the ICTY Appeals Chamber in *Jelisić (Appeal)*, where the Court rightly relied upon the Vienna Convention to construe a Rule (98 bis (B)) of the RPE (§35).

2.4.7 THE ROLE OF JUDICIAL DECISIONS AND THE OPINION OF SCHOLARS

As stated above, judicial decisions—even of the same court—per se do not constitute a source of international criminal law. Formally speaking they may only amount to a

²⁷ In *Blaskić (subpoena)* the ICTY Appeals Chamber asked itself whether the term 'subpoena' used in Rule 54 of the RPE should be understood 'to mean an injunction accompanied by a threat of penalty in case of non-compliance', or instead should be taken to designate a binding order not necessarily implying the assertion of a power to imprison or fine. The Court held that, since under customary international law tribunals were not empowered to issue to States subpoenas capable of being enforced by a penalty, the term was to be given a narrow interpretation: it was to be construed as indicating compulsory orders, which, only when addressed to individuals acting in their private capacity, could imply the possible imposition of a penalty (§§21, 24–5 and 38).

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'subsidiary means for the determination of international rules of law (see Article 38(1)(d) of the ICJ Statute, which reflects customary international law).

Nevertheless, given the characteristics of international criminal law (see *supra*, 2.2) one should set great store by national or international judicial decisions. They may prove of crucial importance not only for ascertaining whether a customary rule has evolved, but also as a means for establishing the most appropriate interpretation to be placed on a treaty rule.

In *Aleksovski (Appeal)*, the ICTY Appeals Chamber held that it could depart from a previous decision by the same Appeals Chamber if it had cogent reasons for so doing (at §§92–111). One may wonder whether the Chamber purported to establish a form of precedent at the Tribunal. The objection is possible that this would be trying to pull oneself up by one's own boot-straps: one cannot establish a doctrine of precedent *by precedent*, for it would be tautological. In any event, that decision was not really precedent. According to the traditional and strict doctrine of precedent, one court has to follow another court's decision, if the prior decision dealt with the same issue, whether it has cogent reasons for departing from it or not. It would therefore seem that according to the *Aleksovski* approach, one Appeals Chamber's decision is only really *persuasive authority* for another Appeals Chamber.

However a decision by an Appeals Chamber *in the very same case* (e.g. the Appeals Chamber directing a Trial Chamber to do x or y) is binding on the Trial Chamber. That, however, is not really a matter of precedent but rather of the hierarchy of power between the appellate and trial levels: the Appeals Chamber has the power to 'order' the Trial Chamber to act in a certain way as a matter of the division of labour between them and their respective powers.

Legal literature, although it carries less weight than case law, may significantly contribute to the elucidation of international rules.

2.5 THE HISTORICAL EVOLUTION OF INTERNATIONAL CRIMES

Traditionally, individuals have been subject to the exclusive (judicial and executive) jurisdiction of the State on whose territory they live. Hence, their possible violations of international rules (for example, ill-treatment of foreigners, attacks on foreign diplomats, wrongful expulsion of foreigners by State officials, etc.) were prosecuted and punished by the competent authorities of the State where these acts had been performed (under the doctrine of territorial jurisdiction). Clearly, such prosecution and punishment only occurred if the State authorities were entitled to do so under their national legislation, and provided they were willing so to proceed. If they did not, the State of which the victim had the nationality was authorized to internationally claim from the delinquent State that it either punish the perpetrators or pay compensation. As what was involved was the responsibility of the State (for failure to bring to trial and

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punish the offenders), the individuals who had *materially* breached international rule could not be called to account by the foreign State, unless they were their nation (think of the case of a Russian killing a Russian diplomat in Berlin). In particular, if the international wrongful act had been performed by one or more State officials (for instance, in that they had wrongfully refrained from instituting criminal proceedings against the material offender or had wilfully instigated him to commit the offence), they were entitled abroad to immunity in that they had acted in an official capacity. Hence, if they travelled to the territory of the aggrieved State and were arrested and brought to trial, they were entitled to claim immunity from jurisdiction as well as from substantive law (if they had the status of heads of State, senior members of cabinets or diplomats, they could also invoke personal immunities and inviolability; consequently, they could not even be arrested let alone put in the dock).

A few exceptions existed. One of them was piracy, a practice that was widespread in the seventeenth and eighteenth centuries, and has recently regained some importance albeit limited to one area of the world, East Asia. (An authoritative definition of piracy can now be found in Article 101 of the 1982 Convention on the Law of the Sea.)²⁸ All States of the world were empowered to search for and prosecute pirates, regardless of the nationality of the victims and of whether the proceeding State had been directly damaged by piracy. The pirates were regarded as enemies of humanity (*hostes humani generis*) in that they hampered the freedom of the high seas and infringed private property.

Another exception was constituted by war crimes. This category of international crimes gradually emerged in the second half of the nineteenth century. Together with piracy (which however is a much older category), it constituted the first exception to the concept of collective responsibility prevailing in the international community.

Two factors gave great impulse and a significant contribution to the emergence of this class of crimes. The first was the codification of the customary law of warfare, as it was then called, at both a private or semi-private level and at State level. At the private level, there emerged the famous Lieber Code, in 1863²⁹ (which, issued by Army order no. 100 of President Lincoln, as 'Instructions for the Government of the United States in the Field', was applied during the American Civil War, 1861–5). Also notable was the adoption by the Institut de Droit international of the important Oxford Manual in 1880.³⁰ At the State level, a remarkable impulse was given by the Hague codification

²⁸ 'Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship, or a private aircraft, and directed
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act or voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft,
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) and (b).'

²⁹ Text in Friedman, I, 158–86.

³⁰ See *Les Lois de la Guerre sur Terre*, Manuel publié par l'Institut de Droit International (Brussels and Leipzig: C. Muquardt, 1880).

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(1899–1907). Secondly, there were some important trials, held at the end of the American Civil War, notably *Henry Wirz* (a case of serious ill-treatment of prisoners of war), heard by a US Military Commission (1865), and then many cases brought in 1902 before US Courts-Martial during the US armed conflict against insurgents in the Philippines (which Spain had ceded by treaty to the USA in 1898). One may mention in particular *General Jacob H. Smith* (about a superior order to deny quarter), the case of *Major Edwin F. Glenn* (concerning an order to torture a detained enemy), that of *Lieutenant Preston Brown* (about the killing of an unarmed prisoner of war), and *Augustine de La Pena* (again a case of torture of an enemy detained person). US courts held many other trials in relation to crimes committed in armed conflict.³¹

Traditionally such crimes were defined as violations of the laws of warfare committed by combatants in international armed conflicts. War crimes entailed that (i) individuals acting as State officials (chiefly low-ranking servicemen) could be brought to trial and punished for alleged violations of the laws of warfare;³² (ii) they could be punished, not only by their own State, but also by the enemy belligerent. The exceptional character of war (a pathological occurrence in international dealings, leading to utterly inhuman behaviour) warranted this deviation from traditional law (which, as already pointed out above, granted to any State official acting in an official capacity immunity from prosecution by foreign States). For many years it was primarily the adversary that before the end of the hostilities as well as thereafter carried out the prosecution and punishment of those guilty of war crimes, on the basis of the principle of 'passive nationality' (the victims of breaches were nationals of the State conducting the trial).³³ Characteristically, the 1912 *British Manual on Land Warfare*

³¹ See the numerous cases cited in W. Winthrop, *Military Law and Precedents*, 2nd edn (Buffalo, NY: William S. Helm & Co., 1920), 839–62.

³² The contrary view of A. Verdross, *Völkerrecht* (Berlin: Springer Verlag, 1937) at 298 was (and is) wrong. (According to the distinguished Austrian international lawyer, 'punishment [of authors of war crimes] must be ruled out when the action was not performed on one's own impulse, but must be exclusively attributed to the State of which the person is a national (*Heimatstaat*)'.) H. Kelsen (*Peace through Law* (Chapel Hill: University of North Carolina Press, 1944, at 97) shared Verdross's view.

³³ According to the authoritative *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the 'United Nations War Crimes Commission' (London: His Majesty's Stationery Office, 1948, at 29) 'The right of the belligerent to punish as war criminals persons who violate the laws or customs of war is a well-recognized principle of international law. It is the right of which a belligerent may effectively avail himself during the war in cases when such offenders fall into his hands, or after he has occupied all or part of enemy territory and is thus in the position to seize war criminals who happen to be there. . . . And although the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of international law prevents the victorious belligerent from imposing upon the defeated State the obligation, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes.'

This view, also shared by H. Kelsen (*Peace through Law*, cit., at 108–10) does not seem, however, to reflect the status of traditional international law. As was conclusively demonstrated by A. Mérignhac ('De la sanction des infractions au droit des gens commises, au cours de la guerre européenne, par les empires du centre', 24 *RGDIP* (1917), 28–56) and L. Renault ('De l'application du droit pénal aux faits de la guerre', *ibid.*, 25 (1918), 5–29), State practice shows that belligerents are entitled to prosecute and punish their servicemen as well as enemy military both during the armed conflict and after the end of hostilities.

stipulated that 'war crimes is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment on capture of the offenders'.³⁴ However, an important exception can be seen in the numerous war crimes trials held in 1902 by US Courts Martial for offences committed by Americans in the armed conflict in the Philippines (1901).

Since the First World War the prosecution was also effected by allies, on the basis either of the principle of territoriality (the crime was committed on their territory), or of passive nationality (it was sufficient for the victim to have the nationality of an allied country). Although various national legislations also made provision for punishment on the basis of the principle of 'active nationality' (the law-breaker had the nationality of the prosecuting State), in practice scant use was made of this principle, for obvious reasons.

The creation of the IMT and the subsequent trial at Nuremberg of the major German criminals (followed in 1946 by the Tokyo Trial), marked a crucial turning point. First, two new categories of crime were envisaged: crimes against peace and crimes against humanity. Secondly, until 1945 (with the exception of the provisions of the 1919 Treaty of Versailles relating to the German Emperor, which however remained a dead letter), senior State officials had never been held personally responsible for their wrongdoings. Until that time States alone could be called to account by other States, plus servicemen (normally low-ranking people) accused of misconduct during international wars. In 1945, for the first time in history, the principle was laid down—and carried through, in contrast to what had happened in 1919—that other State representatives (high-ranking officers, politicians, prominent administrators or financiers, as well as men in charge of official State propaganda) could also be made answerable for gross misconduct in time of armed conflict. Those men were no longer protected by State sovereignty; they could be brought to trial before organs—representative if not of the international community at least of the large group of the allied victors—and punished by foreign States. (However, the idea propounded by such distinguished international lawyers as the American Hyde³⁵ and the Austrian Kelsen,³⁶ that the international Court should consist of neutral nationals, was not upheld, clearly for political reasons, that is, because the victors wished to be and remain in control of the trials.) For the first time the basic principle was proclaimed that, faced with the alternative of complying with either national legal commands or international standards, State officials and individuals must opt for the latter. As the IMT forcefully stated, 'the very essence of the Charter [instituting the IMT] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State' (at 223).

³⁴ Col. J. E. Edmonds and Prof. L. Oppenheim, *Land Warfare, An Exposition of the Laws and Usages of War on land for the Guidance of Officers of His Majesty's Army* (London: His Majesty's Stationery Office, 1912), at 95, para. 441.

³⁵ C. C. Hyde, 'Punishment of War Criminals', *Proceedings of the ASIL* (1943), at 43–4.

³⁶ H. Kelsen, *Peace through Law*, cit., at 111–16.

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After the adoption, in 1948, of the Convention on Genocide (which laid down genocide as a discrete crime), the 1949 Geneva Conventions marked a great advance as regards the extension both of substantive law (new categories of war crimes were added: they were termed 'grave breaches of the Geneva Conventions') and of procedural law (they set up a very advanced system for repressing violations by States; see *infra*, 15.5.1(A)). The relevant provisions represented a momentous departure from customary law, for the Conventions also laid down the principle of universality of jurisdiction (a contracting State could bring to trial a person held in its custody and accused of a 'grave breach', regardless of his nationality, of the nationality of the victim, and of the place where the alleged offence had been committed). It is probable that the exceedingly bold character of this regulation contributed to its remaining ineffective for many years.

The Geneva Conventions were followed by the two Additional Protocols in 1977, the Convention against Torture in 1984 (which significantly contributed to the emergence of torture as a distinct crime), and a string of treaties against terrorism since the 1970s (which contributed to the evolution of an international crime of terrorism).

Later on, as the ICTY Appeals Chamber authoritatively held in *Tadić* (*Interlocutory Appeal*) (§§94–137), the notion of war crimes was gradually extended to serious violations of international humanitarian rules governing *internal* armed conflict.

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